IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1944

No. 300

GEORGE SAM ALOISIO AND WILLIAM ALOISIO,
Petitioners,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

JAMES C. LEATON,
Counsel for Petitioners.

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Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioners, George Sam Aloisio and William Aloisio, respectfully submit this petition for a writ of certiorari to review a judgment of the United States Circuit Court of Appeals for the Seventh Circuit, affirming their conviction in the District Court of the United States for the Northern District of Illinois, Eastern Division. They were convicted by a jury on an indictment charging in one count an evasion of military service by George Aloisio and aiding and abetting such evasion by William Aloisio, in violation of Section 311, Title 50, U.S.C.A.* The petitioners were each sentenced to five years imprisonment, and to pay the costs of prosecution.

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*See Appendix.

SUMMARY STATEMENT OF MATTERS INVOLVED.

Involved in this petition are (1) the stopping of the practice of entrapment by the Federal Bureau of Investigation under circumstances such as shown here wherein at least four persons theretofore innocent were led into the commission of four separate crimes, and (2) relief to the petitioners by reason of (a) their conviction of an offense into the commission of which they were entrapped and (b) the failure of the trial court to properly instruct the jury.

The following summary provides some indication of the application of the points sought to be made. Further details will be found in the brief filed herewith.

REGARDING ENTRAPMENT.

Petitioner George Sam Aloisio was charged with evading military service, and his brother, petitioner William Aloisio, together with one Frank Cerone, was charged with aiding and abetting the evasion. The indictment under which these three were charged (R. 2) was one of four indictments against Cerone. The record discloses that Cerone was implicated in five separate evasions. These evasions were brought about by the bribery of two Chief Petty Officers of the United States Navy assigned to the Induction Center at Chicago.

On the occasion of the first act of bribery and evasion, one of the Officers, acting alone, was bribed. Thereafter, and during the evasion of which these petitioners are charged, this Officer, by reason of his acts having been exposed, was working for and on behalf of the Government; *i.e.*, the Federal Bureau of Investigation. The second Officer was brought into this series of acts by the first Officer, and he was at all times working for and on behalf of the Government.

Cerone was in the scheme from its inception. The petitioners came in only after both Naval Officers were working for the Government, and after the Government through these two Officers, had furnished the facilities and instrumentalities of the crime, and was executing as well as directing it.

The Government did not conceive the crime as committed in the original evasion, but the crime charged against these petitioners was an entirely different one from that originally conceived and executed by Cerone and the first Naval Officer. The Government conceived and executed the crimes of which these petitioners and at least three others were charged.

REGARDING THE INSTRUCTION.

The only actual evasion, as distinguished from a possible intent or attempt to evade with which petitioners were not charged, was the act of the Government in placing on the induction records of the petitioner George Sam Aloisio, with knowledge of their falsity, a stamp bearing the legend, "Rejected by the Armed Forces" and various supporting data. There was no rejection other than this, and as to these acts, the Government committed them in their entirety, and lured the petitioners and others into a questioned participation. These facts were the basis of a requested but rejected instruction to the jury that the acts of Government Agents, which were essential to complete the offense charged could not be imputed to the defendants.

THE BASIS ON WHICH IT IS CONTENDED THE COURT HAS JURISDICTION TO REVIEW THE JUDGMENT OF THE CIRCUIT COURT.

Jurisdiction to review is provided under Section 240 (a) of the Judicial Code as amended by the Act of February 10, 1925, Section 347, Title 28, U.S.C.A. The judgment appealed from was dated June 30, 1945. A petition for rehearing was denied July 23, 1945.

THE QUESTIONS PRESENTED.

I.

Whether the District and Circuit Court of Appeals have entirely misunderstood and misapplied the law of entrapment as laid down by this Court in *United States* v. *Sorrells*, 287 U. S. 435, wherein the Court not only outlined the law, but the philosophy underlying the law of entrapment.

II.

Whether the Government can take an isolated offense, and in an attempt to apprehend the perpetrators, conceive of an entirely new and enlarged offense encompassing new, and at that time wholly innocent, persons, furnish the facilities, instrumentalities and manpower for the commission of the offense, and then itself commit all of the acts of the offense and thereafter impute those acts and any necessary intent to persons so entrapped.

III.

Whether the Government, aside from conceiving a crime, can furnish the facilities and instrumentalities of a crime, and lay a trap for those not engaged in criminal enter-

prises and with no record of prior crimes of a like or other nature, and then prosecute theretofore innocent persons falling into the trap.

IV.

Whether the Government can instigate additional crimes, by theretofore innocent persons, regardless of whether it conceived the first crime.

V.

Whether as a matter of law a defendant can be convicted of an offense where the Government commits any essential element thereof and to complete the offense, must impute its acts to the defendant. Whether the trial court must instruct the jury if requested, and the facts warrant it, that such acts of the Government cannot be imputed to a defendant.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

I.

The holding of the Circuit Court of Appeals that the Government can afford opportunities and furnish facilities for a crime and use artifice and stratagem to induce a person to commit a crime, who is not engaged in a criminal enterprise and who has never been charged or suspected of a crime, much less a crime similar to the one into which he was entrapped, is in conflict with the decision of this Court in *U. S.* v. *Sorrells*, 287 U. S. 435.

II.

The holding of the Circuit Court of Appeals that a defendant could be convicted, even though to complete the offense it was necessary to impute to him an act of the

Government which constituted an essential element of the crime charged, is in conflict with the decision of the Sixth Circuit in *Sherman* v. *U. S.*, 10 Fed. 2nd 17.

WHEREFORE, your petitioners pray that a Writ of Certiorari issue under the seal of this Court directed to the Circuit Court of Appeals for the Seventh Circuit, commanding said Court to certify to this Court a complete record of the proceedings of the said Circuit Court, had in the case entitled *"United States of America, Plaintiff-Appellee,* v. *George Sam Aloisio and William Aloisio, Defendant-Appellants"*, No. 8796, to the end that this cause may be reviewed and that the judgment of said Circuit Court may be reversed, and for such further relief as to this Court may seem proper.

Respectfully submitted,

GEORGE SAM ALOISIO
and WILLIAM ALOISIO,

By JAMES C. LEATON,
Their Attorney.

BRIEF IN SUPPORT OF PETITION.

OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Seventh Circuit (not yet reported) appears in full in the record (R. 219). No formal opinion was rendered by the District Court.

JURISDICTION.

The jurisdiction of this Court is invoked as set forth in the petition for the Writ of Certiorari.

STATEMENT OF THE CASE.

The indictment (R. 2) charged evasion of military service by Petitioner George Aloisio, and that Petitioner William Aloisio (his brother) and defendant Frank Cerone aided and abetted him by paying (Bill of Particulars R. 11) $500.00 to Albert E. Stephenson, Chief Specialist, USNR, assigned to the Armed Forces Induction Station at Chicago for the purpose of inducing him to make false entries on the records of George Aloisio, and by means thereof, obtain his rejection.

The chronology of events is so important in the understanding of this case and the Petitioners' points, that this statement is set out by dates.

Early in March, 1945:

Frank Cerone and Albert E. Stephenson met and talked regarding the obtaining of rejections and special assignments by Stephenson (R. 42).

Later in March:

Stephenson obtained a rejection apparently by merely suggesting to a medical officer at the Induction Center that a certain person who had previously been accepted, had a record of multiple arrests. He was recalled and apparently actually, and conceivably properly, rejected by a person authorized to do so. Cerone paid Stephenson $1000.00 for this rejection (R. 44).

Near the end of March:

Stephenson had two conversations with Chief Petty Officer John Phillip Curran, also assigned to the Induction Center, regarding participation by Curran in a scheme to obtain additional rejections (R. 72).

April 3rd:

Curran informed his superiors of the second conversation with Stephenson, and he was instructed by them and the F.B.I. to proceed with the scheme and, according to Curran (R. 87), get rejected anyone Stephenson or Cerone suggested. F.B.I. Agent Logue told Curran (R. 101) to put the rejection stamp on George Aloisio's induction records, called his "buck sheet." It was after Curran's entry into the scheme at the instance of the Government that the scheme was enlarged to include Curran's participation, the stamps were obtained (R. 46, 74, 75), and that another necessity of the scheme, a private office, was provided (R. 65).

April 12th:

An inductee by the name of Alex was allegedly rejected. This rejection was by Curran who imposed the rejection stamp and the false supporting data on the buck sheet (R. 75). Alex was the first one under the new plan (R. 75). Curran was not authorized to impose the rejec-

tion stamp (R. 39) or to make diagnosis for rejections (R. 41).

April 23rd:

Stephenson was taken into custody and he confessed to the F.B.I., and he, as well as Curran, was instructed to proceed with any additional persons mentioned by Cerone, as had been done in the Alex matter, and to report to them (R. 47).

May 10th:

Stephenson met petitioner William Aloisio and Cerone in the Brevoort Hotel. This was the first time that the name of either of the Aloisios was heard in, and their first contact with, the case (R. 58, 63, 87). Stephenson testified that he met William Aloisio and Cerone and that he was offered $500.00 by Cerone to obtain the rejection of George Aloisio (R. 47, 48). William Aloisio testified that so far as he was concerned, the meeting was accidental, and that all he requested of Stephenson was that his brother be put in radio (R. 122). Stephenson's regular duties (R. 42) were to assign registrants to the various branches of the service; Curran's duties were to screen registrant for radio work (R. 71); Cerone had said to Stephenson (R. 43) that he might have some friends he would want assigned especially in the service (as distinguished from a rejection).

May 11th:

George Aloisio and Cerone met Curran and Stephenson at the Van-Wells Tavern across the street from the Induction Center (R. 76). Aloisio and Curran went across the street and into the Induction Center for a so-called dress rehearsal. Nothing was said about a rejection to George Aloisio, but merely, "You go with Curran. He will show you how to handle yourself tomorrow" (R. 51). No con-

versation was had with George Aloisio which would indicate that he knew that he was to be rejected rather than merely assigned to radio work.

May 12th:

George Aloisio reported to the Induction Center, and Curran stamped his buck sheet "Rejected by the Armed Forces"—and made supporting entries (R. 78). Neither of the Aloisios was consulted at any time with regard to the use of the rejection stamp (R. 86), or the making of the supporting entries.

The record is barren of any testimony or evidence of a rejection or evasion of service by George Aloisio other than this "rejection" by Curran.

Later in May:

Two more alleged rejections were put through in substantially the same manner (R. 146).

May 26th:

Curran, whose acts up to this point had been 100 percent under the direction of the Government, became so apprehensive of his participation in this manufacture of criminals that he said "I better see a lawyer" (R. 85). (This was apparently at or after the fourth alleged rejection.)

SPECIFICATIONS OF ERROR.

(1) The Circuit Court of Appeals erred in failing to hold that the Government had committed an entrapment as a matter of law.

(2) The Circuit Court of Appeals erred in failing to hold as a matter of law that it was entrapment where the Government afforded the opportunity and furnished the instrumentalities of, and directed and executed the crime,

where the defendants had no means with which to commit the crime, had no record of having committed such crime previously, and were not engaged in an enterprise having as its object the commission of such crimes.

(3) The Circuit Court of Appeals erred by holding that under *United States* v. *Sorrells*, 287 U. S. 435, opportunities and facilities for the commission of crime and artifice and stratagem may be employed to lure a citizen into, as well as catch him in the commission of, a crime, who was theretofore innocent and who had not and who was not engaged in a criminal enterprise.

(4) The Circuit Court of Appeals erred as a matter of law in holding that intent and the scheme originated in the minds of the defendants within the meaning of entrapment law and the *Sorrells* case because they participated in the one offense charged; whereas this offense and their entry into the trap postdated by many weeks the laying of the trap by the Government for any and all citizens who might, in all innocence up to that point, come in contact with the trap so laid.

(5) The Circuit Court of Appeals erred in holding that it was not error for the trial court under the evidence in this case to refuse an instruction that acts committed by Government Agents which were necessary to complete the crime, could not be imputed to the defendants.

SUMMARY OF ARGUMENT.

Point I.

The holding of the Circuit Court of Appeals that the Government can afford opportunities and furnish facilities for a crime and use artifice and stratagem to induce a person to commit a crime, who is not engaged in a criminal enterprise and who has never been charged or suspected of a crime, much less a crime similar to the one into which he was entrapped, is in conflict with the decision of this Court in *U. S.* v. *Sorrells*, 287 U. S. 435.

Point II.

The holding of the Circuit Court of Appeals that a defendant could be convicted even though to complete the offense it was necessary to impute to him an act of the Government which constituted an essential element of the crime charged is in conflict with the decision of the Sixth Circuit in *Sherman* v. *U. S.*, 10 Fed. 2nd 17.

ARGUMENT.

Point I.

The holding of the Circuit Court of Appeals is in conflict with a decision of this Court on the law of entrapment.

Cerone and the petitioners are not *in pari delicto*. The petitioners were for the first time brought into this scheme more than a month after the Government was actively participating (R. 103). They had no record of the commission of similar crimes, nor had they pursued any course of conduct which would even justify the leaving of a trap open into which they might fall, much less using artifice and stratagem to have them commit the crime as well as catch them.

It is contended that the Government conceived this series of crimes, as Stephenson's original scheme was nothing more than taking advantage of the record of an inductee as he found it (R. 44, 59). After Curran (who was in all respects and at all times an agent of the Government) entered the case, the scheme was enlarged to include his active participation; the rejection stamps, which were thereafter obtained (R. 46, 61, 62, 74, 75) and the data supporting the stamps; likewise, the private office (R. 65); also, a dress rehearsal (R. 87). These instrumentalities of the crime were furnished by the Government. The crime could not have been committed without them. The petitioners at no time had them in their control or possession. The Government tried the new scheme out on a certain Alex (R. 75) and it worked. At least one other and possibly two more victims were obtained (R. 146) before

the petitioners came in contact with the trap. They had neither been seen nor heard of in connection with the first two and possibly three entrapments (R. 58, 63, 87).

George Aloisio was an industrious boy with two and one-half years at Wright College and a record of employment by the Army Signal Corps (George Aloisio Exhibits 1 (R. 176) and 2 (R. 180), admitted (R. 121) and (R. 122), respectively). The Army had previously requested his deferment (R. 121). He was "nervous" at the dress rehearsal (R. 51). There was no evidence of prior violations of any kind, and he produced character witnesses (R. 119-120).

William Aloisio had no previous record, and he testified (R. 122) that he did not solicit the rejection of his brother George, but merely wanted him in radio work. Stephenson's unsupported testimony of his one meeting with William Aloisio (R. 47) is the sole evidence of William Aloisio's participation in the alleged crime.

There was no evidence that either of the petitioners originated the criminal design or was engaged in crimes similar to the one charged, or in a criminal enterprise, or that they were otherwise than wholly innocent prior to their entrapment in this case. Did not this Court have such circumstances in mind when it said in *Sorrells* v. *U.S.*, 287 U. S. 435-442, "A different question is presented when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute"?

It is appreciated that in the *Sorrells* case, this Court was primarily passing on whether the trial court should have instructed on entrapment, but even a cursory reading of this opinion, including the concurring opinions, indicates that the Court was attempting to lay down a philosophy to govern entrapment cases. Certainly if this

Court intended to mean "those engaged in criminal enterprises" when it used those words, then the decision of the Seventh Circuit Court of Appeals is in conflict with the intent and philosophy of this Court. The petitioners in this case were not engaged in a criminal enterprise. Certainly those words can not be interpreted to mean that the Government can afford opportunities and facilities for the commission of an offense and apply artifice and stratagem to catch anyone engaged in the one offense brought about by the Government and with which they stand charged.

Cerone may have been engaged in a criminal enterprise in his repeated dealings with Stephenson; not so, these petitioners. It may be argued by the Government that Cerone and Stephenson conceived the criminal design, if no distinction is made between the first and second schemes. No one would contend that the Aloisios originated either.

These petitioners had no reasonable chance to escape the trap set and manipulated (R. 60-66) by the Government when Curran was instructed and ordered "to bring about his rejection, and I was following orders" (R. 87). Curran was so abashed by this shocking manufacture of criminals that he was thinking in terms of a lawyer for himself (R. 85), and Stephenson was trying to earn leniency, even freedom, for his confessed crimes. If any one of this series of offenses had fallen through for any reason, Stephenson could assume that he would be blamed for a "tip off." The Government injudiciously placed the enforcement of the law in the hands of these two sailors, one of criminal tendencies and the other inexperienced in law enforcement. The result is that four boys of the total of five (R. 146) are headed for the penitentiary, who might otherwise have lived useful and conceivably heroic lives.

The only possible excuse that appears for the Government to continue to manufacture criminals out of otherwise loyal citizens is that, in his conversation with Curran, Stephenson said that he (or Cerone) had six persons in mind (R. 72). If in attempting to arouse the cupidity of Curran, he had happened to say that he had a hundred persons in mind, would the Government have been justified in continuing to make criminals to that extent? If so, why stop there?

Surely, the *Sorrells* case is not justification for the Government to furnish the gun, the ammunition, pull the trigger, and insofar as the Aloisios were concerned, conceive all three. The Circuit Court of Appeals has by its decision interpreted the *Sorrells* case to sanction the use of artifice and stratagem to have a person theretofore innocent commit a crime, whereas this Court sanctioned the use thereof to catch a person already engaged in a criminal enterprise.

We cannot be proud of persons who try to evade service, including George Aloisio if he in fact did try. Neither can we be proud of a governmental agency for conduct such as this, whether it be the result of an excess of youth and inexperience with a craving for theatrics, as is believed the case here, or the result of sadistic and brutal government such as might be found in some countries in the Old World.

The petitioners moved for a directed verdict on the ground of entrapment at the close of the Government's case (R. 114), at the close of all the evidence (R. 123), and renewed the point in the Circuit Court of Appeals (AE. R. 188).

Point II.

The holding of the Circuit Court of Appeals that acts of the Government can be imputed to a defendant is in conflict with a decision of the Circuit Court of Appeals for the Sixth Circuit.

Petitioners asked for the following instruction (R. 161):

> "If the jury finds from all the evidence that the Government committed any act essential to the completion of the crime, they should find the defendants not guilty."

Certainly this is good law. The facts justified such an instruction, but it was refused and no comparable instruction was given (R. 152). It is error to refuse an instruction good in law and based on the evidence introduced.

The offense charged against George Aloisio was that "he did evade" military service, as distinguished from an attempt to evade which is not and could not have been charged under the statute used. A completed act of evasion was charged. Those acts which, if done by Aloisio, would certainly have supported the indictment, such as making the false entries and stamping the buck sheet "Rejected by the Armed Forces," were performed by the Government. The Government committed these acts and thereupon says that they were committed by George Aloisio and with criminal intent. The Government imputes both the act and the intent to the defendant.

This case is not comparable to an evasion or an act looking toward an evasion by the filing of a false affidavit or the making of false statements by an inductee. In such cases, the inductee would have himself committed the evasive act with the necessary intent. Here, if all the evidence of the Government be taken at face value, George Aloisio only presented himself at the Induction

Station as he was ordered to do. All else was knowingly done by Government Agents. The petitioners were not charged with the substantive offense of bribery or conspiracy to bribe where the act of giving a bribe would have been sufficient regardless of the state of mind or co-operative acts of the person sought to be bribed.

The failure of the Circuit Court of Appeals to hold that the instruction requested should have been given evidences a lack of uniformity and a conflict in the administration of criminal law between the Seventh and the Sixth Circuits, as evidenced by a decision of the latter in *Sherman* v. *U. S.*, 10 Fed. 2nd 17. The Sixth Circuit in the *Sherman* case held that the intent of a government agent could not be imputed to the defendant, and reversed and remanded. Certainly if intent cannot be imputed to a defendant, it should be even more certain that an act could not be.

CONCLUSION.

Other assignments of error were made in the appeal to the Circuit Court of Appeals (R. 188), which were believed sound, but which, due to the circumscribed character of this petition, are not presented here. It is conceivable, however, that the Court might care to look at them by reason of the ever present possibility of error where trials involve war crimes and are held in the heat and passion of war. (Could the trial judge, even granting his effort to be fair, have closed his mind to his own loss of two sons in the war when passing on the motions involving the points raised here?)

It is contended that the principles and philosophy of the law of entrapment announced in the *Sorrells* case, are in conflict with the decision of the Circuit Court of Appeals in this case; that, likewise, a bad case is making bad law

if this decision is permitted to stand imputing to the petitioners the acts of the Government and any intent that the Government might choose to imply from those acts.

It is urged for the reasons stated that the Writ of Certiorari should be granted.

Respectfully submitted,

JAMES C. LEATON,
Attorney for George Sam Aloisio and William Aloisio,
Petitioners.

(Appendix follows)

APPENDIX.

UNITED STATES CODE ANNOTATED
TITLE 50.

Section 311. Offenses and Punishment

Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this

Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. Sept. 16, 1940, 3:08 p.m., E. S. T., c. 720, Sec. 11, 54 Stat. 894.

(19)

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 331

FRANK JOHN CERONE,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION AND BRIEF.

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Supreme Court of the United States

OCTOBER TERM, A. D. 1945.

No.

FRANK JOHN CERONE,

Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Petitioner Frank John Cerone respectfully shows to the Court as follows:

That he is a resident of the County of Cook, and State of Illinois, and is a citizen of the United States, born at Chicago, Illinois on April 12, 1912.

That he was sentenced by the District Court of the United States for the Northern District of Illinois, East-

ern Division, on the 9th day of March, 1945 to five years to run consecutively with and follow the sentence imposed on him on March 7th, 1945 in 44 CR 457 and a fine of $10,000.00 (Tr. 185). charging a violation of Section 311, Title 50, Appendix USCA.

That on appeal from said judgment the Circuit Court of Appeals for the Seventh Circuit on the 30th day of June, 1945, affirmed said judgment; and on the 23rd day of July, 1945, denied a rehearing of said cause; and, on July 24th, 1945, entered an order staying the mandate pursuant to Rule 25 of that court.

SUMMARY STATEMENT OF MATTER INVOLVED.

On the 30th day of June, 1944, the grand jury returned an indictment in the District Court charging George Sam Aloisio with evading services in the armed forces of the United States and William Aloisio and Frank John Cerone with aiding and abetting him in the following manner: William Aloisio and Frank Cerone by the offer and promise of $500.00 as a present and emoulument to certain United States Naval personnel, assigned to service at the Induction Station at Chicago, Illinois, persuaded and induced them to make certain false, untrue and fraudulent entries upon the record of examination, commonly called the "buck sheet," of the defendant George Sam Aloisio, at the Induction Station while George Sam Aloisio was being examined as to his pysical and mental fitness for services in the armed forces of the United States, by means of which said false, untrue and fraudulent entries, George Sam Aloisio was rejected for service in the land or naval forces of the United States: that George Sam Aloisio did, while being examined and having possession of his record of exam-

ination, called the "buck sheet," hand and present said record of examination, called the "buck sheet" to said United States Naval personnel in order that they might make said false, fraudulent and untrue entries thereon, all of said defendants, well knowing that said entries were false, fraudulent and untrue and then and there intending by means of said false, fraudulent and untrue entries to procure the rejection of George Sam Aloisio for service in the land or naval forces of the United States.

The defendants pleaded not guilty, were tried by a jury and found guilty.

Motions for directed verdict, motions for new trial and arrest of judgment were denied with exceptions, and a bill of exceptions was presented.

STATEMENT OF FACTS.

Four indictments under the same statute were returned, as follows:

1. 44 CR 454, U. S. v. George N. Alex and Frank Cerone.
2. 44 CR 455, U. S. v. Charles Bartoli and Frank Cerone.
3. 44 CR 456, U. S. v. William and George Aloisio and Frank Cerone.
4. 44 CR 457, U. S. v. James and Frank Cerone.

The government elected to proceed first with the trial of 44 CR 457, followed with 44 CR 456, which is the subject matter of the present petition, with the remaining two indictments continued until the October Term 1945.

Petitioners did not take the witness stand. The evidence of the government may be briefly stated as follows: Chief

Petty Officer Stephenson was assigned to the induction center at Chicago with duties of reviewing buck sheets and assigning selectees to the various branches of the armed service. He met Frank Cerone in March, 1944, at a tavern and after several conferences Frank Cerone suggested Stephenson try to formulate a plan to have selectees rejected (Tr. 43); thereafter, by his own efforts, Stephenson secured the rejection of Bartoli and was paid $1,000.00 by Frank Cerone (Tr. 45). On March 27th or 28th Stephenson contacted Chief Petty Officer Curran, assigned to the same induction center, whose duties were to induce qualified selectees to enter radar training (Tr. 71). Stephenson told Curran of the first rejection and wanted Curran to assist him in securing further rejections (Tr. 72). Curran never had any intention of entering into the securing of rejections, delayed for a time to think it over, and immediately reported the matter to his superior officers, including Stephenson's confession as to Bortoli (Tr. 73, 74). Agents from the Federal Bureau of Investigation were called in. Curran was ordered by his superior officers to work under the direction of Agents, and thereafter was in constant touch and under orders of the Agents (Tr. 89). Curran and Stephenson then formulated a new plan for securing rejection of selectees (Tr. 45, 46, 60, 61, 62), which consisted of having the selectee meeting Curran and Stephenson one day prior to their examination when selectees were taken to the induction center, where under surveillance of Agents, they were put through a rehearsal and instructed as to what to do on the day of their examination (Tr. 87). It was the plan of Stephenson and Curran to reject selectees on a mental basis and they secured a "Rejected by the Armned Forces" stamp, a "Pyscho-neurosis Mixed Type" stamp and a list of medical words, which if

indorsed on the buck sheet, would show a mental unfitness (Tr. 74, 75).

On April 13th, 1944, the first rejection under this plan, that of George Alex, was procured by Curran writing on his buck sheet the medical findings constituting him unfit for service. Curran also stamped thereon the stamp of "Psycho-neurosis Mixed Type" and the stamp of "Rejected by the Armned Forces" (Tr. 89). For which Stephenson received from Frank Cerone $1,000.00, paying $500.00 to Curran. On April 23, 1944, Stephenson confessed and informed the Agents of every fact and detail of the Charles Bartoli and George Alex cases and also the plan with Curran. Stephenson agreed with the Agents to follow their orders and directions (Tr. 102, 104, 105).

On May 12, 1944, the rejection of George Sam Aloisio was procured by Curran writing on his buck sheet the medical finding constituting him unfit for service. Curran also stamped thereon the stamp "Rejected by the armed forces," and wrote thereon "Pre-psychotic state, schizoid type." (Tr. 78) For which rejection Stephenson received $500.00 delivering $250.00 to the Agents and $250.00 to Curran. (Tr. 79)

As in the previous rejection of George Alex, George Sam Aloisio was, previous, to his examination, rehearsed, instructed and conducted through the induction center by Stephenson and Curran, under the surveillance of the Agents who took moving pictures. (Tr. 110)

As in the previous rejction of George Alex, George Sam Aloisio, under order of the Agents was formally notified of his rejection by his draft board, (Tr. 35) and was subsequently arrested.

Jurisdiction.

This Court has jurisdiction to review this cause under Section 240 of Judicial Code, Title 28, Section 347, and Section 688, Title 18, Criminal Code and Criminal Procedure, and Rules 11 and 12 of Criminal Procedure of this Court. (USCA Pocket Edition to Title 18.)

Question Presented.

There is one question presented to this Court, whether the acts performed by the law enforcement officers can be imputed and charged to the petitioners.

Reasons Relied Upon for the Allowance of the Writ.

So far as the petitioner is informed this case presents for the first time whether law enforcing agents may actually perform the essential elements of an offense and impute and charge them to the accused.

Petitioners in the Circuit Court of Appeals by leave of Court filed a consolidated brief and that Court properly filed a consolidated opinion. However, the contentions of the petitioners, John Cerone and Frank Cerone, are not mentioned in the opinion and the petition for rehearing urging the same contentions was denied.

Specification of Errors.

The trial court erred in not directing a verdict of not guilty; in overruling a motion for a new trial; and overruling motion in arrest of judgment.

The Circuit Court of Appeals erred in affirming the judgment.

WHEREFORE it is respectfully requested this petition for a writ of certiorari be allowed and the writ be granted to review the judgment of the Circuit Court of Appeals for the Seventh Circuit.

FRANK JOHN CERONE,

By Gerald T. Wiley
Keith E. Sakrison
Eugene A. Sapp, Jr.
Attorneys for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the Circuit Court of Appeals rendered in this cause is found at Tr. 84.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Title 28, Section 347, and Section 688, Title 18, Criminal Code and Criminal Procedure and Rules 11 and 12 of Criminal Procedure of this Court (USCA).

The order of the Circuit Court of Appeals became final on July 23, 1945, on which date it denied the petition for rehearing (Tr. 91).

ARGUMENT.

The acts of the agents were the essential elements of the offense.

When Agents of the Federal Bureau of Investigation were brought into the case they immediately took charge, elected to proceed and give orders. The acts of the personnel, from that time, became the acts of the Agents. These acts are setting up of a counterfeit induction center, interviewing and instructing inductees, filling out and indorsing selectees' examination (buck sheet) not in the presence of the selectees, thereafter, the delivery thereof to the selectees and instructing them to re-enter the line of examination, where under supervision and orders of the Agents, the examination sheet was collected and selectees sent home.

It is our further contention the facts in this case fall within the cases mentioned in the case of *Sorrels v. United States,* 287 U. S. 435, 442, mentioned under the following:

> "There may also be physical conditions which are essential to the offense and which do not exist in the case of a trap, as for example, in the case of a prosecution for burglary where it appears that by reason of the trap there is no breaking. *Rex.* v. *Egginton,* 2 Leach, C.L. 913, 168 Eng. Reprint 555; *Reg.* v. *Johnson,* Car & M 218, 174 Eng. Reprint 479; *Saunders* v. *Peo.,* 38 Mich. 218; *People* v. *McCord,* 76 Mich. 200, 42 N.W. 1106, 8 Am. Crim. Rep. 117; *Allen* v. *State,* 40 Ala. 334, 91 Am. Dec. 477; *Love* v. *Peo.,* 160 Ill. 501, 32 L.R.A. 139, 43 N.E. 710."

It is not contended that the facts in the instant case fall within the *Sorrels* case, but they fall under the above sen-

tence of that case. This Court appears to have approved the principle set forth in the case.

Love v. *Peo.*, supra, which has been cited in and by #1 Wharton Criminal Law, page 527, sec. 390, 1932 ed., which states:

> "The decoys and detectives so long as they do not cease to be decoys and detectives and not become the originators of the criminal act *or do some overt act constituting the offense charged* are not guilty of the crime charged although apparently lending their aid and cooperation." (Italics Ours.)

In the 15 American Jurisprudence, section 335, page 25, it appears:

> "However, a different situation is presented where the defendant, intending to commit a crime, proposes to a third person to assist in it, and he seeking to decoy the defendant and secure his conviction, assents to the scheme and assists in carrying it out after notifying the authorities. In such a case the defendant cannot be convicted unless he does or participates in all the acts necessary to constitute the crime. The principle here involved is that the defendant cannot be charged with any act done by the decoy, because the decoy has no criminal intent."

Among the authorities cited in support of the principal is *State* v. *Hayes*, 105 Mo. 76, 16 S.W. 514, 24 Am. St. Rep. 360, overruled on another point 142 Mo. 450, 44 S.W. 239, wherein the defendant proposed a burglary to one H who consented but notified the authorities. The defendant and H went to the building in question and the defendant opened a window and assisted H to enter. H handed out goods to the defendant who carried them away. It was held that the defendant could not be convicted of burglary because he had not done all the acts essential to constitute that crime.

In *State* v. *Jansen*, 22 Kan. 498, cited in *State* v. *Hayes*, supra, the Court, quoting Judge Brewer, said:

> "The act of a detective may not be imputable to the defendant as there is a want of community of motive. The one had a criminal intent, while the other is seeking the discovery and punishment of crime."

The instant prosecution is predicated upon the evasion of services in the Armed Forces of the United States in violation of Section 311, Title 50, Appendix, USCA, which is as follows:

> "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any person or persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of

the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. Sept. 16, 1940, 3:08 p.m., E.S.T., c. 720, sec. 11, 54 Stat. 894."

CONCLUSION.

It is respectfully suggested that the question urged is substantial. It is not idle or frivolous. It is a question as we view of conviction for a crime the defendants did not commit.

WHEREFORE, we further suggest that the record is such that in the exercise of the discretion reposed in this Court the writ of certiorari be granted, and the cause reviewed.

All of which is respectfully submitted.

GERALD T. WILEY,
10 South LaSalle Street,

VICTOR E. LARUE,
208 South LaSalle Street,

EUGENE A. TAPPY,
127 North Dearborn Street.
Attorneys for Petitioner.

August 14, 1945,
Chicago, Illinois.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

No. 332

JAMES SAMUEL CERONE,
FRANK JOHN CERONE,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION AND BRIEF.

GERALD T. WILEY,
VICTOR E. LARUE,
EUGENE A. TAPPY,
Attorneys for Petitioners.

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PETITION FOR A WRIT OF CERTIORARI

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1944.

JAMES SAMUEL CERONE,
FRANK JOHN CERONE,
Petitioners,

VS.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIROARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI.

Petitioners James Samuel Cerone and Frank John Cerone respectfully show to the Court as follows:

That they are residents of the County of Cook, and State of Illinois, and are citizens of the United States, born at Chicago, Illinois, James Cerone, on July 14, 1919 and Frank Cerone on April 12, 1912.

That they were sentenced by the District Court of the United States for the Northern District of Illinois, East-

ern Division, on the 7th day of March, 1945. James Cerone was sentenced to a term of five years. Frank Cerone was sentenced to five years and fined $10,000.00 upon an indictment charging violation of Section 311, Title 50, Appendix USCA.

That on appeal from said judgment the Circuit Court of Appeals for the Seventh Circuit on the 30th day of June, 1945, affirmed said judgment; and on the 23rd day of July, 1945, denied a rehearing of said cause; and, on July 24th, 1945, entered an order staying the mandate pursuant to Rule 25 of that court.

SUMMARY STATEMENT OF MATTER INVOLVED.

On June 30, 1944, the grand jury returned an indictment in the District Court charging James Cerone with evading services in the armed forces of the United States and Frank Cerone with aiding and abetting him in the following manner: Frank Cerone by the offer and promise of $500.00 as a present and emolument to certain United States naval personnel, assigned to service at the Induction Station at Chicago, Illinois, persuaded and induced them to make certain false, untrue and fraudulent entries upon the record of the examination commonly called the "buck sheet" of the defendant James Cerone, at the Induction Station, while James Cerone was being examined as to his physical and mental fitness for services in the armed forces of the United States, by means of which said false, untrue and fraudulent entries James Cerone was rejected for service in the land or naval forces of the United States; that James Cerone did, while being examined and having possession of his record of examination, called the "buck sheet," hand and present said record of

examination called the "buck sheet" to said United States Naval personel in order that they might make said false, fraudulent and untrue entries thereon, both of said defendants well knowing that said entries were false, fraudulent and untrue and then and there intending by means of said false, fraudulent and untrue entries to procure the rejection of James Cerone for service in the land or naval forces of the United States.

The defendants pleaded not guilty, were tried by a jury and found guilty.

Motions for a directed verdict, motions for new trial and a arrest of judgment were denied with exceptions, and a bill of exceptions was presented.

STATEMENT OF FACTS.

Four indictments under the same statute were returned, as follows:

1. 44 CR 454, U. S. v. George N. Alex and Frank Cerone.
2. 44 CR 455, U. S. v. Charles Bartoli and Frank Cerone.
3. 44 CR 456, U. S. v. William and George Aloisio and Frank Cerone.
4. 44 CR 457, U. S. v. James and Frank Cerone.

The government elected to proceed first with the trial of 44 CR 457, which is the subject matter of the present petition, followed with 44 CR 456, with the remaining two indictments continued until the October Term 1945.

Petitioners did not take the witness stand. The evidence of the government may be briefly stated as follows: Chief Petty Officer Stephenson was assigned to the induction

center at Chicago with duties of reviewing buck sheets and assigning selectees to the various branches of the armed service. He met Frank Cerone in March, 1944, at a tavern and after several conferences Frank Cerone suggested Stephenson try to formulate a plan to have selectees rejected (Tr. 16); thereafter, by his own efforts, Stephenson secured the rejection of Bartoli and was paid $1,000.00 by Frank Cerone (Tr. 17). On March 27th or 28th Stephenson contacted Chief Petty Officer Curran, assigned to the same induction center, whose duties were to induce qualified selectees to enter radar training. Stephenson told Curran of the first rejection and wanted Curran to assist him in securing further rejections. Curran never had any intention of entering into the securing of rejections, delayed for a time to think it over, and immediately reported the matter to his superior officers, including Stephenson's confession as to Bartoli (Tr. 35). Agents from the Federal Bureau of Investigation were called in. Curran was ordered by his superior officers to work under the direction of the Agents, and thereafter was in constant touch and under orders of the Agents. Curran and Stephenson then formulated a new plan for securing rejections of selectees, which consisted of having the selectee meeting Curran and Stephenson one day prior to their examination when selectees were taken to the induction center, where under surveillance of Agents, they were put through a rehearsal and instructed as to what to do on the day of their examination. It was the plan of Stephenson and curran to reject selectees on a mental basis and they secured a "Rejected by the Armed Forces" stamp, a "Pyscho-neurosis Mixed Type" stamp and a list of medical words, which if indorsed on the buck sheet, would show a mental unfitness (Tr. 17, 35).

On April 13th, 1944, the first rejection under this plan, that of George Alex, was procured by Curran writing on

his buck sheet the medical findings constituting him unfit for service. Curran also stamped thereon the stamp of "Psycho-neurosis Mixed Type" and the stamp of "Rejected by the Armed Forces." (Tr. 17, 35, Ex. 5, 6, 7). For which Stephenson received from Frank Cerone $1,000.00, paying $500.00 to Curran. (Tr. 24). On April 23rd Stephenson confessed and informed the Agents of every fact and detail of the Charles Bartoli and George Alex cases and also the plan with Curran. Stephenson agreed with the Agents to follow their orders and directions, with the understanding there would be no indictment against him for getting subsequent rejections (Tr. 25).

On May 12, 1944, the rejection of George Sam Aloisio was procured by Curran writing on his buck sheet the medical finding constituting him unfit for service. Curran also stamped thereon the stamp of "Psycho-neurosis Mixed Type" and the stamp of "Rejected by the Armed Forces." For which rejection Stephenson received from Frank Cerone $500.00, delivering $250.00 to the Agents and $250.00 to Curran, who turned it over to the Agents. (Tr. 25, 26).

James Cerone appeared for examination on May 24th, 1944. As in the previous rejections on May 23rd, he was rehearsed, instructed and conducted through the induction center by Stephenson and Curran, under the surveillance of the Agents, who took moving pictures.

On May 24th, 1944, at the time of his examination, James Cerone regularly received his papers for examination, the "buck sheet," took all regular examinations to the station where he was told to step out of line and proceed to Curran's office. Curran had petitioner put his buck sheet in Curran's desk drawer and instructed petitioner to return in one-half hour. As in the previous rejections, and under

the surveillance of Agents, in his own handwriting Curran indorsed the medical finding constituting mental unfitness and further indorsed thereon the rubber stamp of "Psychoneurosis Mixed Type" and the rubber stamp "Rejected by the Armed Forces." Frank Cerone paid Stephenson $500.00 for the rejection. Stephenson gave $250.00 to the Agents and $250.00 to Curran. Curran gave his $250.00 to the Agents. (Tr. 28, 29, 36)

With the exception of the Bartoli case, the rejected selectees, under orders of the Agents, were formally notified of their rejections by their respective draft boards and all subsequently arrested.

Jurisdiction.

This Court has jurisdiction to review this cause under Section 240 of Judicial Code, Title 28, Section 347, and Section 688, Title 18, Criminal Code and Criminal Procedure, and Rules 11 and 12 of Criminal Procedure of this Court. (USCA Pocket Edition to Title 18)

Question Presented.

There is one question presented to this Court, whether the acts performed by the law enforcement officers can be imputed and charged to the petitioners.

Reasons Relied Upon for the Allowance of the Writ.

So far as petioners are informed this case presents for the first time whether law enforcing agents may actually perform the essential elements of an offense and impute and charge them to the accused.

Petitioners in the Circuit Court of Appeals by leave of Court filed a consolidated brief and that Court properly

filed a consolidated opinion. However, the contentions of the petitioners, John Cerone and Frank Cerone, are not mentioned in the opinion and the petition for rehearing urging the same contentions was denied.

Specification of Errors.

The trial court erred in not directing a verdict of not guilty; in overruling a motion for a new trial; and overruling motion in arrest of judgment.

The Circuit Court of Appeals erred in affirming the judgment.

WHEREFORE it is respectfully requested this petition for a writ of certiorari be allowed and the writ be granted to review the judgment of the Circuit Court of Appeals for the Seventh Circuit.

Respectfully submitted,

JAMES SAMUEL CERONE,
FRANK JOHN CERONE,

GERALD T. WILEY,
VICTOR E. LARUE,
EUGENE A. TAPPY,
Attorneys for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinion Below.

The opinion of the Circuit Court of Appeals rendered in this cause is found at Tr. 84.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code, Title 28, Section 347, and Section 688, Title 18, Criminal Code and Criminal Procedure and Rules 11 and 12 of Criminal Procedure of this Court (USCA).

The order of the Circuit Court of Appeals became final on July 23, 1945, on which date it denied the petition for rehearing (Tr. 91).

ARGUMENT.

The acts of the agents were the essential elements of the offense.

When Agents of the Federal Bureau of Investigation were brought into the case they immediately took charge, elected to proceed and give orders. The acts of the personnel, from that time, became the acts of the Agents. These acts are setting up of a counterfeit induction center, interviewing and instructing inductees, filling out and indorsing selectees' examination (buck sheet) not in the presence of the selectees, thereafter, the delivery thereof to the selectees and instructing them to re-enter the line of examination, where under supervision and orders of the Agents, the examination sheet was collected and selectees sent home.

It is our further contention the facts in this case fall within the cases mentioned in the case of *Sorrels v. United States,* 287 U. S. 435, 442, mentioned under the following:

> "There may also be physical conditions which are essential to the offense and which do not exist in the case of a trap, as for example, in the case of a prosecution for burglary where it appears that by reason of the trap there is no breaking. *Rex.* v. *Egginton,* 2 Leach, C.L. 913, 168 Eng. Reprint 555; *Reg.* v. *Johnson,* Car & M 218, 174 Eng. Reprint 479; *Saunders* v. *Peo.,* 38 Mich. 218; *People* v. *McCord,* 76 Mich. 200, 42 N. W. 1106, 8 Am. Crim. Rep. 117; *Allen* v. *State* 40 Ala. 334, 91 Am. Dec. 477; *Love* v. *Peo.,* 160 Ill. 501, 32 L.R.A. 139, 43 N.E. 710."

It is not contended that the facts in the instant case fall within the *Sorrels* case, but they fall under the above sen-

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Among the authorities cited in support of the principal is *State* v. *Hayes,* 105 Mo. 76, 16 S.W. 514, 24 Am. St. Rep. 360, overruled on another point 142 Mo. 450, 44 S.W. 239, wherein the defendant proposed a burglary to one H who consented but notified the authorities. The defendant and H went to the building in question and the defendant opened a window and assisted H to enter. H handed out goods to the defendant who carried them away. It was held that the defendant could not be convicted of burglary because he had not done all the acts essential to constitute that crime.

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The instant prosecution is predicated upon the evasion of services in the Armed Forces of the United States in violation of Section 311, Title 50, Appendix, USCA, which is as follows:

> "Any person charged as herein provided with the duty of carrying out any of the provisions of this Act, or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said Act, rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment, or muster, and any person who shall knowingly make, or be a party to the making of, any false statement or certificate as to the fitness or unfitness or liability or nonliability of himself or any other person for service under the provisions of this Act, or rules, regulations, or directions made pursuant thereto, or who otherwise evades registration or service in the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect to perform any duty required of him under or in the execution of this Act, or rules or regulations made pursuant to this Act, or any persons who shall knowingly hinder or interfere in any way by force or violence with the administration of this Act or the rules or regulations made pursuant thereto, or conspire to do so, shall, upon conviction in the district court of

the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, or if subject to military or naval law may be tried by court martial, and, on conviction, shall suffer such punishment as a court martial may direct. No person shall be tried by any military or naval court martial in any case arising under this Act unless such person has been actually inducted for the training and service prescribed under this Act or unless he is subject to trial by court martial under laws in force prior to the enactment of this Act. Precedence shall be given by courts to the trial of cases arising under this Act. Sept. 16, 1940, 3:08 p.m., E.S.T., c. 720, sec. 11, 54 Stat. 894."

CONCLUSION.

It is respectfully suggested that the question urged is substantial. It is not idle or frivolous. It is a question as we view of conviction for a crime the defendants did not commit.

WHEREFORE, we further suggest that the record is such that in the exercise of the discretion reposed in this Court the writ of certiorari be granted, and the cause reviewed.

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August 14, 1945,
Chicago, Illinois.

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In the Supreme Court of the United States

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No. 331

FRANK JOHN CERONE, PETITIONER

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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The appeals in these cases were heard together and were disposed of in one opinion in the circuit court of appeals (No. 300, R. 219–225; No. 331, R.

208–215; No. 332, R. 84–91), which is not yet reported.

JURISDICTION

The judgments of the circuit court of appeals were entered June 30, 1945 (No. 300, R. 225; No. 331, R. 214; No. 332, R. 90), and petitions for rehearing were denied July 23, 1945 (No. 300, R. 231; No. 331, R. 215; No. 332, R. 91). The petition for a writ of certiorari in No. 300 was filed August 6 and the petitions in Nos. 331 and 332 were filed August 17, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTION PRESENTED

Whether petitioners are relieved from criminal liability for evading and aiding and abetting evasion of service in the armed forces by reason of the fact that certain of the personnel of the United States Navy who were acting as informers performed acts which contributed to the rejection for service of petitioners James Cerone and George Sam Aloisio.

STATUTE INVOLVED

Section 11 of the Selective Training and Service Act of 1940, c. 720, 54 Stat. 885, 894–895, 50 U. S. C. App. 311, provides in part as follows:

> * * * any person * * * who * * * evades registration or service in

> the land or naval forces or any of the requirements of this Act, or who knowingly counsels, aids, or abets another to evade registration or service in the land or naval forces or any of the requirements of this Act, or of said rules, regulations, or directions, * * * shall, upon conviction in the district court of the United States having jurisdiction thereof, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment, * * *.

STATEMENT

On June 30, 1944, two indictments were returned in the District Court of the United States for the Northern District of Illinois, one against petitioners George Sam Aloisio, William Aloisio and Frank John Cerone, and the other against petitioners James Cerone and Frank John Cerone. Both indictments charged violations of Section 11 of the Selective Training and Service Act and, except for the dates and defendants, were practically identical. The indictment against James and Frank Cerone charged that James evaded service in the military forces and that Frank aided and abetted him in this evasion by corrupting certain naval personnel assigned to the induction center at Chicago to make false and fraudulent entries on the record of examination of James, thereby causing James to be rejected for service (No. 332, R. 2–4). The second indictment charged George

Aloisio with evasion of service and William Aloisio and Frank Cerone with aiding and abetting his evasion (No. 300, R. 2–4; No. 331, R. 2–4).

In separate jury trials under these indictments (No. 300, R. 16; No. 332, R. 10) petitioners were each convicted (No. 300, R. 162; No. 332, R. 56). James Cerone, George Aloisio, and William Aloisio were each sentenced to five years' imprisonment and Frank Cerone was sentenced to five years' imprisonment and to pay a fine of $10,000 in each case, the sentences to run consecutively (No. 300, R. 165, 184–185; No. 332, R. 56–57, 70–71). Upon separate appeals by George and William Aloisio (No. 300, R. 186), Frank and James Cerone (No. 332, R. 72), and Frank Cerone (No. 331, R. 191–192), respectively, which were consolidated and disposed of in a single opinion, the judgments were affirmed by the Circuit Court of Appeals for the Seventh Circuit (No. 300, R. 225; No. 331, R. 214; No. 332, R. 90).

The evidence adduced at the trials is of the same nature and may be summarized as follows:

In the early part of March 1944, Chief Petty Officer Albert Stephenson, who was assigned to the induction station at Chicago, was introduced to petitioner Frank Cerone, who asked him whether he could help in keeping "some of the boys" from being inducted into the armed forces. Several days later Cerone again met Stephenson

and offered to reward him if he could devise a plan whereby some of Cerone's friends would be rejected for military service. Thereafter Stephenson and Cerone discussed a plan through which rejections would be effected by marking the registrant's record of examination, or "buck sheet," with a stamp indicating that he was a psychoneurotic. On March 16, 1944, Stephenson effected the rejection of one of Cerone's friends and received in return $1,000 from Cerone. Later Cerone suggested that the plan was a little slipshod and that a better method should be adopted. (No. 300, R. 42–45; No. 331, R. 42–45; No. 332, R. 16–17.)

Thereafter Stephenson sought to enlist the assistance of Chief Petty Officer John Philip Curran, who was also assigned to the induction center, in the plan to secure rejections for certain registrants. Curran said he would think it over. The next day Curran reported the matter to his commanding officer and on April 3, 1944, he disclosed Stephenson's proposition to Naval Intelligence officers and Special Agents of the Federal Bureau of Investigation. Curran was directed to resume his duties and to take orders from Special Agent Logue, who instructed him to "go along" with any requests which Stephenson might make. Thereafter Stephenson went to Curran's office and a scheme was devised whereby the registrant was to drop out of the examining line at a certain point, hide his papers inside his shirt, and proceed

to Curran's office, where Curran would mark his papers so as to indicate that he was psychotic and would stamp them "Rejected by the Armed Forces." From there the registrant was to return to the line as a reject. (No. 300, R. 45, 59–62, 71–74, 92, 98; No. 331, R. 45, 59–62, 71–74, 92, 98; No. 332, R. 17, 35–37, 43.)

About April 13, 1944, this plan was put into effect and operated successfully to secure the rejection of one George Nick Alex, for which $1,000 was paid to Stephenson by Frank Cerone (No. 332, R. 18, 24, 36).

On April 23rd Stephenson was taken to the Federal Bureau of Investigation headquarters, where he was advised that both the Bureau and Naval Intelligence knew exactly what had happened in the case of Alex. Stephenson gave a signed statement to the Bureau, and was told to continue with the plan and to report his activities to the Bureau. He was instructed not to communicate with Frank Cerone or frequent places where he was accustomed to meet him and to do nothing until he received word from Cerone. While he was not to take the initiative in making any contact with Cerone, Stephenson was instructed to do anything that Cerone requested him to do. (No. 300, R. 47, 63–65, 67–68, 93; No. 331, R. 47, 63–65, 67–68; No. 332, R. 24–25, 42, 44.)

On May 10, 1944, in response to a telephone call from Frank Cerone, Stephenson met him and William Aloisio at a hotel. Cerone pro-

posed that Stephenson secure the rejection of the younger brother of William Aloisio in return for $500; Stephenson advised them that he would have to discuss the matter with Curran. Willam Aloisio showed Stephenson the notice to George Aloisio to appear for examination and arrangements were made to meet the following day at a tavern. Pursuant to this arrangement, Cerone, George Aloisio, Curran, and Stephenson met at the tavern and discussed a plan of effecting George's rejection. Curran took George across the street to the induction center, where he explained the plan and rehearsed George in its details. Upon returning to the tavern Cerone told George, "You just follow instructions tomorrow. Everything will be all right." (No. 300, R. 47–52, 75–78.)

On May 12, 1944, George Aloisio reported to the induction center, dropped out of the line and appeared at Curran's office, where he gave his papers to Curran, who made certain notations on the "buck sheet" and stamped it, "Rejected by the Armed Forces." Thereafter George Aloisio was rejected for service and came back to Curran's office to advise him of that fact and to thank him. On the same day Frank Cerone paid Stephenson $500 for effecting this rejection. (No. 300, R. 52–55, 78–79, 108–113; No. 331, R. 52–55, 78–79, 108–113.)

On May 22, 1944, upon receiving another call from Frank Cerone, Stephenson met Cerone and

was told that Cerone's brother James was to come up for pre-induction physical examination on May 24th and that Frank would pay Stephenson $500 to secure the rejection of James. The next day Frank and James Cerone, Curran, and Stephenson met at a tavern and discussed the procedure which James was to follow. The plan of having James fraudulently rejected for psychiatric reasons was discussed with James, who assured Stephenson that since he had not been examined by the psychiatric unit on a previous trip to the induction station, the plan could be safely followed. Frank Cerone told James that under no circumstances was he to identify either Stephenson or Curran in the event he should be questioned regarding his rejection. Curran told James that when he reported to the induction station the following morning he should stay in the line to a certain point, where he was to fall out and report to Curran's office, at which place his papers would be altered (No. 332, R. 18, 35–36). This procedure was followed on May 24, when James reported at the induction station, and he was accordingly rejected. Thereafter, Frank Cerone paid Stephenson $500 for effecting James' rejection. (No. 332, R. 19, 32, 36–37, 47.)

In each case the trial judge instructed the jury, *inter alia,* that "if you find from the evidence in this case that the defendants, or either of them,

had not conceived the intention of committing this offense, but committed it as a result of the suggestions and lures of the Government officers, that the offense originated in the mind of the Government officers and not of the defendants, and that the Government officers lured these defendants on for the purpose of entrapping, arresting and prosecuting them, then you shall find the defendants not guilty" (No. 300, R. 158; No. 331, R. 158; No. 332, R. 54).

ARGUMENT

Petitioners George and William Aloisio contend (No. 300, Pet. 13–16) that the actions of Chief Petty Officers Stephenson and Curran, who were acting pursuant to the directions of special agents of the Federal Bureau of Investigation, constitute entrapment. The contention wholly ignores the uncontradicted evidence that petitioner Frank Cerone first solicited these officers to obtain a rejection for James Cerone in return for $500, and that petitioners Frank Cerone and William Aloisio first approached them to secure a rejection for George Aloisio. In each instance it was petitioners who first broached the commission of the crime and asked assistance in carrying it out. Nor are petitioners James Cerone and George Aloisio relieved by the fact that inside assistance was procured for them by their brothers, since the night before each was to report for

induction, James Cerone and George Aloisio met with Frank Cerone and the two government informers for the purpose of being instructed in the means by which they could obtain a rejection by the armed forces.

Under these circumstances it is clear that the genesis of the idea, the real origin of the criminal intent, sprang from the minds of petitioners in each instance, and that, far from being induced or lured into the commission of the offense by the informers, petitioners enlisted the assistance of Stephenson and Curran. The defense of entrapment is applicable only where the government agents instigate the crime and is not available where they merely allow "the crime already conceived to be carried out sufficiently to obtain evidence necessary for a conviction of the crime." *Farber* v. *United States,* 114 F. 2d 5, 10 (C. C. A. 9), certiorari denied, 311 U. S. 706. See also *United States* v. *Lindenfeld,* 142 F. 2d 829, 831 (C. C. A. 2), certiorari denied, 323 U. S. 761, and cases cited; *Weathers* v. *United States,* 126 F. 2d 118, 119 (C. C. A. 5), certiorari denied, 316 U. S. 681.

Nor is there any merit in the petitioners' argument (No. 300, Pet. 17–18; No. 331, Pet. 9–12; No. 332, Pet. 9–12) that the government agents themselves performed acts which were essential elements of the offenses charged and which are not imputable to petitioners. The crucial act in each

case was, of course, the evasion of service by fraudulently causing James Cerone and George Aloisio to be rejected by the armed forces. When the feigned accomplices Curran and Stephenson obtained the necessary stamps and, upon the solicitation of petitioners, agreed to stamp James Cerone's and George Aloisio's examination sheets, "Rejected by the Armed Forces," and to make false entries of psychiatric disorders thereon, they were, as the court below stated (No. 300, R. 224), at most affording facilities for the petitioners to carry out their preconceived criminal design. James Cerone and George Aloisio, aided and abetted by Frank Cerone and William Aloisio, utilized that opportunity by presenting themselves at Curran's office at the induction center for the purpose of having their papers fraudulently altered and stamped and thus securing the desired rejection. Hence, in order to sustain petitioners' convictions, it is not necessary to impute to them the acts of the government agents, who merely feigned the parts of accomplices. Petitioners' own acts constituted the commission of the crimes for which they stand convicted.

These cases do not differ essentially from others in which government agents, acting as or through decoys, furnish the means whereby suspected persons commit offenses which they themselves have conceived. In such circumstances there is no entrapment. See *United States* v. *Lindenfeld, supra.*

Sorrells v. *United States,* 287 U. S. 435, upon which petitioners rely, is not to the contrary, for this Court expressly recognized that officers or employees of the Government may afford opportunities or facilities for the commission of an offense, using artifice and stratagem to catch those engaged in criminal enterprises, without defeating a prosecution (see pp. 441, 445, 453–454). Hence there is no conflict between the decision of the circuit court of appeals and the principles announced by this Court in the *Sorrells* case.

The most that can be said for petitioners' argument is that the issue of entrapment was a question of fact for the juries' determination, under proper instructions. *Sorrells* v. *United States,* 287 U. S. 435. In each case the trial judge correctly instructed the jury as to the law of entrapment and charged that if they should find that the defendants had not conceived the intention of committing the offense but had been lured into doing so by the government agents, a verdict of not guilty should be returned (No. 300, R. 158; No. 331, R. 158; No. 332, R. 54). The juries resolved this issue against petitioners and since the verdicts have been left undisturbed by two courts, there is no occasion for further review by this Court. *United States* v. *Johnson,* 319 U. S. 503, 518; *Delaney* v. *United States,* 263 U. S. 586, 590.

CONCLUSION

The decision below is correct and no conflict of decisions is involved. We therefore respectfully submit that the petitions for writs of certiorari should be denied.

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